No. 11911

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CATHERINE O'CONNOR,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

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STATUTES AND TEXTBOOKS

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STATEMENT

This is an appeal from the District Court's judgment of conviction of the defendant, Catherine O'Connor, upon an indictment under Sec. 145b of the Internal Revenue Code, in three counts, 1942, 1943 and 1944. A timely motion for a bill of particulars was made, upon a showing by affidavit. It was denied. Defendant plead not guilty to all three counts. A jury trial was had and the jury disagreed on all three counts. A second jury trial was had, and the jury convicted on the first count (1942) and disagreed on the other two. The Court

pronounced judgment of 6 months imprisonment and $5000 fine, and made a different written judgment imposing imprisonment in default of payment of the fine.

The government called agent-investigator Krause who testified to the alleged income of defendant, putting into evidence the final totals by Exhibits 28, 29, and 30. Although demanded to be inspected by the defense, to be put into evidence, or to determine the items making up the sums testified to, all were denied; and defense never did have an opportunity to inspect the "work sheets" from which the witness testified, or to put them in evidence, or to learn the items or computations making up the totals testified to by Krause.

In the first trial, the principal investigator Agent Tormey testified as the principal witness to a different account and computations of income (materially different in most items, and smaller business receipts but larger net income). He was not called by the prosecution in the second trial, and it was necessary for the defense to call him as an adverse witness. The court did not permit impeachment, nor to go into the investigation nor motives of Tormey. It was learned that the same basic data was used in each government computation, with much different results; and that the accounts involved investigation of unknown third persons, and was not confined to the records in evidence.

The defendant was surprised, misled, and suf-

fered prejudice by the failure to obtain the bill of particulars, or to discover the items making up the income, deductions, etc.

There are numerous errors assigned, and set forth in a separate writing filed in this cause. The questions, objections, and rulings specified as error; the instructions requested and not given, and the erroneous instructions given; and the portions of the record showing matters specified as error are set forth in the supplement of this brief.

Under the year of 1942 of which the defendant stands convicted the indictment charged "Gross Income" and under that "Net profit from bar $2,785.50". The Krause figures, Exhibit 28, gives the comparable item of "corrected business income" as $172.13. The Tormey first trial figures give the comparable item as $1267.18.

The accused was a person of little education or experience in business. She acquired a half interest in the small bar on Valencia St., San Francisco, for $1,000 in 1940. She married Jost in March, 1942. Upon the credit and savings of the community, she acquired the other half interest of the bar in July, 1942, for $1650. She theretofore relied upon her partner for tax returns. Knowing her inadequacy, she employed an accountant of 30 years experience, provided him with records he requested, and she and her husband made the return prepared by the accountant. She was divorced from her husband in 1943 by an interlocutory decree silent as to property matter and by a final

decree in 1944 also silent on property. Because she alleged in her divorce complaint, upon which a default was taken, that she had no community property in July, 1943, the Court excluded all matters of community property or community property income during marriage. The divorced husband testified for the government. So did the accountant.

ARGUMENT

There was no offense proved against the Defendant and the Directed Verdict requested should have been given.

The indictment charged the defendant in the first count (1942):

Gross Income		
Net Profit from bar		$2,785.92
Salaries		1,380.00
Rental income		303.00
Partnership income		2,116.05
		$6,584.97
Deductions:		
Contributions	$152.50	
Interest paid	73.00	
		225.50
Net income		$6,359.47

The principal difference was *income from bar* (July 42 to end of year). Let us compare these differences with the evidence.

Exhibit 28 (Krause computations) Corrected bus. inc.	$ 172.13
Tormey's computations, corrected business income (Trans. 577)	1,267.18
Sum charged in the indictment	2,785.92

That the defendant's accountant, Bosserman, computed a different net income from bar[1] and defendant

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[1]Actually the government witness Bosserman who computed and drew the original return, shows a loss, for the operations of the bar by the defendant from July 16, 1942, to Dec. 31, 1942. The partnership return does not reflect many deductions as loss from theft which was considerable as shown by the defendant's testimony nor does it contain usual items of business deductions as depreciation, etc. The government offered no evidence as to the partnership income, except the partnership return which we can assume understated deductions as Bosserman did in subsequent returns:

1942 Deductions (Bosserman computations in return)	$11,082.81
1942 Deductions: Krause allowed in Pros. comp. (Tr. 425)	15,216.34
Deductions understated according to prosecution figures	$ 4,123.53
1943 Deductions (Bosserman computations in return)	$22,493.40
1943 Deductions—Krause allowed in Pros. comp. (Tr. 426)	28,676.53
Deductions understated according to pros. figures	$ 6,183.13
1944 Deductions (Bosserman computations in return)	$25,763.40
1944 Deductions—Krause allowed in pros. comp. (Tr. 426)	41,098.14
Deductions understated according to pros. figures	$15,334.74

In fact Bosserman even omitted to deduct his own fee paid to himself by the defendant, as an allowable deduction, which is clearly an allowable deduction. Tr. 272.

A proof of the partnership income, we can infer, follows the same general pattern. The duty to prove the actual amount of income is an element which the prosecution, not the defendant bears.

and her husband, Jost, relied upon it and signed the return is not denounced as an offense by Congress.

Furthermore, the tax on the $172.13 income shown by Exhibit 28 is a negligible sum.

Furthermore, there is a material variance seen in the allegations and the proof, for the allegations of the indictment for the principal item in dispute is net profit from bar charged at $2,785.92 and the proof by Krause, Ex. 28, is $172.13, a very substanial difference.

The indictment (second count) charges for 1943:

Gross Income		
Net profits from bar		$21,684.25
Rental income		324.66
		$22,008.91
Deductions:		
Contributions	$255.00	
Taxes	155.00	
		410.00
Net income		$21,582.91

Evidence shows:	
Tormey computations used at first trial by pros. corrected business receipts (Tr. 571)	$44,187.65
Krause computations used at second trial by pros. corrected business receipts (Ex. 29)	46,506.45
Tormey computations, Other Income (Tr. 575)	324.66
Krause (second trial), Other Income (rents, Ex. 29) LOSS	28.60
Tormey computations, Business Deductions (Tr. 574)	24,630.31
Krause computations, Business Deductions (Ex. 29)	28,676.53
Bosserman computations, relied upon by defendant in making 1943 return (Tr. 426), Business Deduction	22,493.40

These figures show that the defendant's accountant for the returns, and relied upon by the defend-

ant, computed business deductions far less than either of the government's computations. This would show no conscious effort to defeat or defraud the government.

Let us use the Government's figures most favorable to the defendant—1943:

Corrected Business receipts (Tormey, first trial)	$44,787.65
Business deductions (Krause, second trial)	28,676.53
Net profits from bar, using above government figures	$16,111.02
Other income (Krause, second trial figures) LOSS	28.60
Net Income	$16,082.42
Deductions alleged in indictment	410.00
	$15,672.42

The defendant was married to Jost in March, 1942, and lived with her husband in California until the separation in July, 1943, (government's testimony, Tr. 162) and the interlocutory decree in July, 1943, was silent as to community property, and the marriage was not dissolved until the final decree of divorce in 1944.

The presumption is that mixed property is wholly community.

Rucker v. Blair, 9 Cir. 32 F2d. 222.

And community property continues until the final decree of divorce dissolves the marriage and the community.

That on the date of filing of the divorce complaint, the community property up to that time had been spent (Tr. 761-2) does not effect this rule, and com-

munity property thereafter acquired continues until the final decree of divorce.

Thus half of the figure of $15,672.42 shown above, from the government's various figures, is less than $8,289.28 taxable income computed by Bosserman and relied upon by the defendant in her 1943 return and upon which she duly paid taxes.

The indictment, third count (1944), charged:

Gross Income	
Net income from bar	$24,579.05
Rental income	451.83
	$25,030.88
Deductions—Standard	500.00
Net income	$24,530.88
Evidence shows:	
Corrected Business Income—(Krause, Ex. 30)	$54,004.30
Corrected Business Income—(Tormey, Tr. 569)	50,342.45
Business Deductions—(Krause, Ex. 30)	41,098.14
Business Deductions—(Tormey, Tr. 568)	23,052.30
Business Deductions—Bosserman in 1944 returns	25,763.40
Other income (rents—Krause, Ex. 30)—LOSS	1,295.74

Suppose we take the Government's computations most favorable to the defendant—1944:

Corrected Business Income (Tormey, Tr. 569)	$50,342.45
Business deductions (Krause, Ex. 30)	41,098.14
Income from bar on above	$ 9,244.31
Other income (Krause, Ex. 30)—LOSS	1,295.74
	$ 7,448.57
Standard deduction	500.00
	$ 7,448.57

The community was not dissolved by divorce until

middle of 1944, and at that time the parties became tenants in common of the community property. Thus using a rough rule of thumb that one-half of these Government figure income of $7,448.57 was earned before the community was dissolved, and half afterwards; thus one-fourth roughly would be chargeable to Jost and three-quarters would be reportable by the wife, and this figure would approximate the $5,591.98 computed by Bosserman, entered by him on the 1944 return and relied upon by the defendant and upon which she paid her tax.

B.

There is a total lack of *willful intent* shown by the prosecution's own case and evidence. Mrs. O'Connor employed prosecution witness Bosserman as an accountant to prepare her returns, starting for the taxable year 1942. She provided him with her records. She did not instruct him to omit any part (Tr. 265). She filed the returns he prepared without change and without question (Tr. 236-7).

There was conflict in the evidence as to the defendant providing Bosserman with the bank statements and checks. However, Bosserman testified he would not have used the bank statements and cancelled checks and bills if she had brought them to him, in his work in preparation of the returns (Tr. 235). He knew she had a bank account and checking account (Tr. 268). He knew from his accounting work that other taverns and bars had income from music machines, pin ball and claw machines (Tr.

233). He was in the defendant's place of business several times (Tr. 232). and must have seen the obvious machines—a disclosure more vivid and positive than any verbal information from the defendant.

Certainly a person disclosing the existence of this income, the existence of the bank and checking account to a public accountant of 30 years' experience and licensed to practice before the Treasury in tax matters, has done all she can. The professional man judges what data and information he must have to perform the skilled services of a return, and the nature and extent of his services necessary to perform his employment. The defendant cannot tell him his business, but must rely upon his judgment. She did. She relied upon his skill and judgment. She submitted the returns he prepared and told her and her husband to sign, and they did. That two prosecution witnesses, agents in the Intelligent Unit, may have used these same records to arrive at two different and separate results is not criminal nor proof of a crime.

Aside from the prosecution witnesses' testimony, which included the work sheet of Mr. Bosserman showing checks as items from which it must be conclusive proof he had the checks before him to make that work sheet for the return he drafted; and aside from the letter of Mr. Bosserman showing that he knew the defendant had no knowledge of income tax matters and relied upon him, which was refused admission in evidence; the defense evidence shows that the entire records and memorandum of the de-

fendant was provided Bosserman for each return, before he prepared it. The defense evidence also shows that the defendant had never before prepared a return, but had relied upon her partner. The first time was 1942, when she and her husband had the responsibility of filing returns alone, and she realizing her lack of knowledge, hired a public accountant who held himself out as skilled and with years of experience, provided him with all the data and records he asked, and relied upon his judgment and skill.

C.

Mr. Barlow, a certified public accountant, a partner in a firm of certified public accountants in San Francisco, and a man skilled in income tax accounting work was called as an expert by the defense. He testified that on the basis of Government's Exhibit 28, etc., that there was *no* tax for 1942 (Tr. 532-5). Obviously, a party cannot be guilty of attempting to defraud the government of an income tax for a period in which there was no income tax.

Mr. Barlow was asked the same hypothetical question the prosecution expert was asked, using the Government's figures and evidence, for 1943, and upon which the Government contends it can prove a tax for the year 1943 by the answer of its expert. Mr. Barlow testified that it would be impossible to compute the 1943 tax from those figures and facts without making an assumption of fact (which assumption the trial judge ruled was assuming a fact not in evidence)—and which assumption would in-

volve a fact not in evidence at any part of the proceedings (Tr. 539-544). Obviously, there was no showing of any tax imposed on the defendant for the year 1943 and it was improper for the court to submit the second count (1943) to the jury, and refuse the directed verdict submitted for the second count. The jury disagreed for a second time on this count, as it did on the third count.

D.

As to the second and third counts in the indictment, there was no evidence offered, and no contention of any evidence that the defendant did anything within the Spies Case as an act amounting to a felony. That the Government agents might compute a different series of figures from the defendant's books and records, than the prosecution witness Bosserman did in his work and preparation of the returns in his professional employment by the defendant, is not fraud or even negligence, unless it was negligence in employing an accountant whose ultimate computations differed from the prosecution witnesses' computations. We might point out that Bosserman's computations did not vary or differ as greatly as the Government's indictment, the Government's figures in the first trial by Agent Tormey or the Government's figures in the second trial by Agent Krause differed, each from the other.

E.

All of the acts of the signing of the returns, in-

cluding the keeping of the books were done by the defendant in the presence of her husband.

It is a long established, basic concept of our jurisprudence, that acts done by a wife in the presence of her husband are presumed to be done at his compulsion.

Living in the same building is within the presence of the husband, raising the presumption that must be overcome by positive testimony of the prosecution. The evidence of the prosecution included prosecution witness Jost, the husband later divorced, and the prosecution's witness proved the facts raising the presumption (Tr. 162, 172, 176). See also defendant's testimony, Tr. 692, 698-9, 700, 767-8, and 833.

F.

At the termination of the prosecution's case, and in the absence of the jury, defense counsel started to make a motion for dismissal upon the grounds of the insufficiency of the evidence. The Court ordered the motion made before and in the presence of the jury.

Defense counsel considered the circumstances, and the most unusual nature of this request. It is habitual and customary for such motions to be made in the absence of the jury, for obvious reasons. Secondly, defense counsel considered his very low percent of success the record showed at that time on motions and ruling in that case, upon matters that appeared meritorious. Thirdly, defense counsel noted the intonation and the manner the court used the word "proceed" which looks innocently enough in a cold

record, but when used in the courtroom in the manner of a drill sergeant to a recruit, it left the conception of a positive command; and counsel also noted the court's intonation of other phrases as "There is nothing before the court" which looks innocent also in cold print, but when spoken with inflection implied defense counsel had no valid point and was "bamboozling" the court. After considering these things, defense counsel considered that the court's ruling might appear innocently enough in a cold record on appeal, if a motion were made in the presence of the jury, but it might well be said with such inflections and intonations of the Court as to amount to a directed verdict to convict. The motion was not made before the jury, and was prohibited at the end of the day, before the court in the absence of the jury.

It is better practice to make such a motion in the absence of the jury.

Upon the Second Trial, the Prosecution refused to call Agent Tormey who was the Principal Investigator, and Principal Witness in the First Trial and who prepared the accounts used by the Government in the First Trial. Defendant was required to call him as an adverse witness and the Court refused to permit the Defendant to examine him as an Adverse Witness.

Government Agent Tormey was the principal prosecution witness in the first trial. He assisted Agent Krause in the original investigation. Krause went to Sacramento and Tormey finished the investigation, made a report which Krause and Tor-

mey signed; Tormey made the second and third "spreads" resulting in the prosecution accounts, the basis of the first trial. Tormey's conduct of his investigation was a subject of much testimony at the first trial.

At the second trial, he was not called by the prosecution. The defense was required to call him, and did so as an adverse witness under Rule 43(b). Transcript pgs. 558-561, and Suppl. Thereafter all questions as to anything that touched Agent Tormey's vicious acts, or that showed his state of mind toward the defendant, or anything connected with the investigation were excluded upon objection of the prosecution that this witness was the defendant's witness, etc., and upheld as proper objections by the Court.

Examples are questions asking the number of times Tormey saw the defendant after undertaking this case. Tr. 580-1, and Suppl.; if he went to the defendant's place of business in the course of the investigation in the fall of 1946 or spring of 1947, Tr. 582-4 and Suppl.; about the time Tormey brought a blonde girl to the defendant's apartment, Tr. 585-593 and Suppl. Counsel cited the Court to the rule of *Suburban Fruit Lands Co. v. Soderman* 9 Cir. 36 F2d. 934, *Herencia v. Guzman* 219 US 44, 31 SCt. 135, 55 L.Ed. 81, and *Scotland County v. Hill* 112 US 183, 5 S.Ct. 93, 28 L.Ed. 692 and Rule 43(c). He was ordered to desist, and never was permitted to read the testimony of Tormey on direct examination of Mr. Campbell Dec. 3, 1947,

Vol. 7, pg. 655 of the first trial. The objection to this line of testimony was that defendant would be impeaching Government Agent Tormey, her own witness, for bias and prejudice of Tormey and the Court upheld the contention of the prosecution. Tr. 591-4 and Suppl.

Tormey testified differently on the second trial and defense counsel contended that this was hostile acts of the witness. Prosecution counsel objected and the court ordered the remarks of defense counsel to go out. (Tr. 589-9 and Suppl.)

Questions tending to show the account of Tormey, testified to in the first trial, were based upon totals without supporting figures or items was objected to by the prosecution as an attempt to impeach their own witness and that defendant was advancing the government's first trial computations as defendant's correct computations! (Tr. 599-600.) The questions going to what Tormey's account (prosecution used in the first trial) contained were objected to and sustained as immaterial and an attempt to impeach the defendant's own witness. (Tr. 600-1, and Suppl.) Tormey was asked to add the items he gave as a total of $331, and the items totaled $277.07. Asked to add these before the jury, Mr. Campbell objected as an attempt to impeach defendant's own witness and the court sustained the objection. (Tr. 605 and 606-7 and Suppl.)

At page 608 of the transcript, counsel for defense, in the presence of the jury, was threatened

with punishment for contempt for attempting to show the government's computations were made up of a series of totals, the items of which had been testified to by Govt. Agent Tormey and whose arithmetical total did not approximate the total testified to by that government agent. Thereafter all objections to interrogations of Government Agent Tormey as to the items were sustained by the Court. (Tr. 608-9 and Suppl.)

Prosecution counsel could not have but known, from the first trial, as demonstrated by the objections interposed, for almost any accounting period involved, that there were figures drawn from thin air, supported by items whose totals did not equal these figures in the government's calculations and account. This type of testimony would prove to any trier of fact the weight to be given to such computations and account. The threat of punishment for contempt in the presence of the jury, and the limitation of the examination was damage and serious prejudice to the defendant's case.

At page 650 to 654 of the transcript, defense witness Beall's testimony relative to the investigation of the government in this case, and showing vicious motives and malice toward the defendant, was wholly excluded.

At pages 811 to 815 of the transcript the defendant was precluded from testifying as to the government's investigation of the case, and Agent Tormey's acts in his official duties in the case.

The prejudice and damage to the defendant by

denunciation of a government agent, precluding the defense the opportunity to obtain the matters going into the denunciation, but merely putting the final conclusions of the government agent into evidence is nothing short of a trial by denunciation well known on the Continent of Europe but unknown to our jurisprudence. The agent took unknown alleged facts determined by him from unknown persons, together with some of the records of the defendant; and these items were put into unknown columns resulting in unknown sums, to which unknown amounts were added and/or subtracted in the so called "work sheets" to give the basic data for Exhibits 28, 29 and 30. We do know that Agent Tormey and Agent Krause used the same basic data, and the same method of accounting (which Mr. Barlow, CPA, and expert for the defendant testified was not a method used by accountants, and which would tend to overstate income). By this method of accounting, the computations of gross-income by Krause were greatly overstated when measured beside the government's first trial accounts and computations.

As Mr. Barlow testified such a method of accounting would overstate income, so the prosecution in both trials advanced figures predicated upon an overstatement by their method of accounting. This could be done to any person engaged in business, for the totals of all money passing through the cash-register, through the bank accounts, and through cash disbursements must of necessity ex-

these rulings and the treating of Agent Tormey as a witness of the defendant, though called by her as an adverse witness, is so apparent as not to require further comment.

Although often demanded during the Trial, the Defendant was prevented from going into the basis of the Government's computations and accounts, refute the denunciation or show the motive for its institution.

The prosecution's case was predicated upon the calling of an agent, who testified as to the defendant's alleged income for each of the years covered in the indictment. Then he testified to the difference between these amounts and the amounts computed by government witness Bosserman's computations in the returns, upon which the tax was paid.

Over a dozen separate demands were made by the defense for the basis of these figures—the work sheets from which the government agent testified on the stand. The defense never got them. They were shown to counsel for a few minutes during one afternoon recess, and that was all.

In the first trial, defense counsel was permitted to work for a couple of days with the work sheets of the computations in the account and computations used in that trial. The jury disagreed on the first trial, and the prosecution did not use those accounts or computations again, nor permit the defense to determine the items that went into the totals testified to in the second trial.

Any such practice of building a case upon a

ceed gross income. Distributions of cash were presumably determined by all disbursements shown in the book, plus all discovered by investigation, less those clearly indicated by check payments. The double vice is apparent when certain cash payments and check payments were combined by Krause in his account, to reduce the deductions. When a system of computing income, not used by accountants in their profession, tending to overstate income, cannot be permitted to be put before the jury showing the items used to arrive at the totals, and defense counsel must be refused the right of inspection of the items making up the totals, then such a prosecution case has passed beyond the field of due process, 5th Amendment or the basic concepts of Anglo-Saxon jurisprudence.

Furthermore, the original computations made by Tormey were offered at the first trial by the government as absolutely correct and lawful; yet it differed greatly in almost every respect and item of totals, as for example corrected business income, from the second account and computations made by Krause for the 2nd trial. Yet these denunciations, each claimed by the same counsel in the same case, with the same issues, but at two separate trials, to be absolutely correct and to be accepted without question is the prima facie case upon which the judgment of imprisonment, fine, conviction of a felony and brand of criminality is based and predicated.

In addition to this, it appears that Mr. Tormey

was the party making much of the investigation to determine alleged facts from unknown third persons upon which the accounts and computations are based—the basic data, with the exception that Krause had within his withheld basic data, unknown results of inquiries made of some governmental agency, the Bureau of Public Debt. With the exception of this single unknown determination, the same basic data with the same methods of accounting (tending to overstate income) Krause overstated Tormey's figures of business income (corrected) from $1200 to $3600 in each of the three years involved.

Yet the prosecution failed to call Tormey as a witness, and it was necessary for defendant to call him as an adverse witness. It was then contended that Mr. Tormey's conduct of his investigation, motives, etc., could not be gone into as the defendant would be impeaching her own witness. If the initiator of the "report" (preliminary denunciation), and principal fact finder of the basic unknown data, Tormey, could have been shown to the jury as a petty employee on his first case who tried to get the defendant to supply an apartment to a blonde girl brought by Tormey, with all attendant circumstances; if the conduct of soliciting an evening including free drinks at the defendant's place of business, and the nature of his conversations and his remarks; and if the other similar matters could have been admitted into evidence as they should

have been, a far different case would have been presented to the jury.

Yet the immediate superior of Tormey who signed the original denunciation (report), Agent Krause, who must justify the official denunciation and the conduct of the investigation made under his responsibility, was not permitted to be interrogated on cross-examination by the defendant as to the conduct of the investigation, nor even as to his participation or knowledge of this phase of the investigation.

The withholding of Tormey as a witness by the prosecution, in view of his connection as the principal witness for the prosecution in the first trial, and his activities as principal fact finder for the basic data used in the suppressed "work sheets", should evidence the depths to which the prosecution sunk in its conduct of the case, and by itself is grounds for reversal.

Certainly the motives of this denunciation, these computations, are the proper subject of evidence in the case at bar. One of the proofs of motive is not the testimony of a biased and witness who should be fearful of dismissal for misconduct, that he has no malice; but the acts, words and conduct of Tormey during the actual fact finding which was the basis of the unknown items in the unknown computations is the only reliable testimony. There was every reason for Tormey to do harm to the defendant which he did by his misrepresentations against the taxpayer. There was every reason for

Krause to cover up his responsibility with a conviction by putting these unknown figures into unknown columns to reach a result to justify his original report signed by himself and Tormey. Certainly the great divergance in figure which were the basis of his computations, summarized in Exhibits 28, 29, and 30 showed such divergance in both corrected business income and other income from that made by Tormey (using the same basic data and same method of accounting likely to overstate income), should justify an inquiry as to what items went into what columns, that were the difference and/or sums resulting in the figures going into those exhibits. Certainly these discrepancies were enough to cast the gravest doubt upon the motives of those making the alleged account and computations—the denunciation which is the basis of the instant case.

Any person, no matter how honest, can be convicted upon such a trial by denunciation. A petty government employee no matter what his motives (so bad as proved on the first trial that the prosecution would go to any ends to keep them from the jury), can submit a denunciation that the taxpayer made certain income in excess of his reported income, and set shocking figures and allegations in the denunciation, the first of which is the "report". These are reviewed and presumed true. The wheels of the Penal Division and the Department of Justice are started turning against the taxpayer, solely on this original denunciation. Presumably,

the denunciation alone is presented to the Grand Jury and the indictment follows. At the trial, the petty employee testifies he computes the income at such and such a figure (by a method likely to overstate income). The taxpayer can ask the methods of how he handled this or that item. The taxpayer demands to know what is in the columns making up these inflated and overstated figures, particularly income. The bill of particulars is denied. The prosecution contends there are thousands of items in the "work sheets". The "work sheets" are demanded for examination, and refused; demanded as evidence, and denied. There would be no way to prove the taxpayer is innocent of the denunciation, except to testify to a mass of detailed transactions; so whenever a strong point is to be brought out (and particularly if the prosecution knows them before hand, it being a re-trial) an objection is interposed and no matter how weak or illfounded, it is sustained. While the accused is proving the defense, the trial judge insists the trial is lagging and insists the defendant's counsel is wasting time—nine times—so the jury has the impression it is not material nor worthy of consideration. What chance would any taxpayer have in such a position? The denunciation is the basis of the prosecution and their case. It is that denunciation which follows through to the stamp of the felon, the judgment of conviction and the sentence of fine and imprisonment and the degradation of a convicted criminal. If this is permitted under our jurispru-

dence, "trial by denunciation" has become a reality in this great nation, and due process, the requirement of an indictment by a grand jury, etc., are but empty phrases in the Constitution.

A Bill of Particulars was timely requested. It was denied. The Defendant was surprised and the Items of Account in the Prosecution Account and Computation was refused inspection by the Defendant or to be put into evidence though repeatedly demanded.

The defendant's counsel worked diligently in the preparation of the instant case. No method of accounting nor estimation upon the facts provided by the defendant would approximate the figures charged in the indictment, but more nearly approximated the returns of the defendant.

It was apparent that Bosserman in preparing the returns had omitted many deductions the law provided. It was also apparent that although Bosserman knew of the income from the claw machine, pinball and juke box, and the deposits of the defendant in her commercial account, he had merely totaled the cash register totals of bar sales and made up the returns on them as the sole source of income. Yet the cash checked out of the bank, including income other than bar sale receipts, went for the most part to business expenses. Thus as other unreported income appeared, so did unreported deductions, and the final results closely approximated the income on which tax was paid.

Counsel for defendant had at his disposal only some of the cancelled checks, bank statements, book

of account, miscellaneous receipts and the recollection of his client which covered numerous transactions over a three year period. Many of these matters had been handled by agents and employees of the defendant. Her recollections were those of a woman who knew little of business and who had relied on others in many instances and whose memory for detail was at best hazy after the passage of five or more years.

Several informal discussions were held between counsel for the defendant and the Government counsel and agents in which it appeared that there were income and deductions determined from investigation and examination of books of those who dealt with the defendant in 1942, 1943 and 1944 which did not appear in the books or records of the defendant.

A demand was made for a bill of particulars to discover what these various items were that made up the income and deductions that resulted in the mathematical difference between business income and expenses to be the item "net income from bar" charged in the indictment. It was refused. So an affidavit of counsel for the defendant in support of the demand for bill of particulars was filed, setting forth substantially the above facts and circumstances. Along with it was the affidavit of defendant herself setting forth these facts and her inability to supply her counsel with this data and information.

Upon the motion hearing, Mr. Siegel, assistant

counsel in the penal division, testified that all the computations were based on matters within the defendant's records. (Tr. of Sept. 2, 1947)

The motion for the bill of particulars was denied.

Upon the first trial, Mr. Tormey, a government agent who made the investigation for the most part, and the person making the computations, testified as the principal government witness.

Defense counsel was permitted to work for a couple of days during the first trial upon the work sheets and to go at length into these matters, particularly the deductions. Defense counsel showed these computations in their true light, together with the facts of Mr. Tormey's investigations which shed light (or we might say a dirty shadow) on his personal motives and malice toward the defendant.

It was not until the fourth day of the second trial, March 26th, Transcript Pgs. 322-323, that defense counsel learned a new and separate and different computation had been made and new and different income sought to be proved against the defendant.

The prosecution found from the first trial and cross-examination of their agent Tormey that the charges against the defendant could not be substantiated by their accounting. They knew that if the defense counsel could find what items made up the totals, they had a case that could not convince a jury, in the face of cross-examination and the defendant's testimony.

The only possible reason for refusing a bill of particulars and opposing a motion for a bill of particulars was to surprise the defense and to preclude the showing to the court and jury by defense of the errors, falacies and omissions in the prosecution's computations and account.

The prosecution knew the weakness of its case. They therefore caused a new and separate account to be prepared and to give the defendant some of the lawful deductions proved at the first trial. To show a taxable income, this second computation using the same basic data and the same method of accounting inflated the "corrected business receipts":

1942 Ex. 28 (Krause)—Corrected Business Receipts	$15,388.48
Agent Tormey, first trial computation, Tr. 579	13,941.59
Inflated by	$ 1,274.75
1943 Ex. 29 (Krause)—Corrected Business Receipts	46,506.45
Agent Tormey, first trial computation, Tr. 571	44,187.65
Inflated by	$ 2,318.80
1944 Ex. 30 (Krause)—Corrected Business Receipts	54,004.50
Agent Tormey, first trial computation, Tr. 569	50,342.45
Inflated by	$ 3,651.85

This was enough to put any reasonable person upon notice that these second trial computations were wrong; that one need only find what items that went into these second figures, to show the Court and jury that there was no tax at all, and there was no case.

Defense counsel requested of the government

counsel the right to inspect these items that made up these ultimate figures testified to by Agent Krause. He had these in so called "work sheets" in which each item was entered and each computation made for the ultimate results entered as beginning totals in Exhibits 28, 29 and 30. This was refused defense counsel. Demand was made to the Court for an order to produce them more than a dozen times. The defendant did not get them.

A.

The defendant stated to the Court at Transcript Pg. 350 that Mr. Krause's testimony of a separate and subsequent accounting and computation had caught him by *surprise*:

Tr. Pg. 350. "Mr. Campbell: You may cross-examine (Mr. Krause).

Mr. Crittenden: If your Honor please, this has caught me by complete surprise. There are a number of things he has covered in his direct examination in connection with his computations that are much out of line with the former computations and testimony we had. Your Honor will remember—

Mr. Campbell: If your Honor please, I object to this, I think this is highly improper.

Mr. Crittenden: I have to go into those questions.

The Court: You may bring those matters up in the absence of the jury. You may proceed with the cross-examination.

Mr. Crittenden: Q. Mr. Krause, you were here during the last trial, weren't you?"

* * * *

It appears on Transcript Pages 322-323 on voir dire questioning of Mr. Krause by the defense counsel:

Mr. Crittenden: I understood that Mr. Tormey made all the computations after your first. He made the second and third spread, isn't that correct?

Mr. Campbell: I object to that question. That is not a voir dire question. This man has shown his qualifications. I have no objection to any questions as to this man's qualifications as an accountant.

Mr. Crittenden: He has not made the computations.

Mr. Campbell: He stated he has.

The Court: You may take him over on cross-examination and ask him any question you wish.

Mr. Crittenden: Your Honor remembers the testimony at the former trial. Mr. Tormey is the one who made the computations.

The Court: You may develop that on cross-examination.

Mr. Campbell: Q. You made this audit, did you, Mr. Krause?

A. I personally made this examination to which I am testifying.

Q. When did you complete it, Mr. Krause?

A. The audit, here, oh, about a week or two ago.

* * * *

B.

It was not until almost the end of the second trial that it was learned from the testimony of Agent Tormey that the figures of the Government were not confined to the defendant's records and papers, but included other matters.

Mr. Tormey testified, Transcript 572, that Krause obtained information outside the record.

"* * * In this case, in Mr. Krause's audit, he got authentic bond records from the Bureau of Public Debt, which shows that she had purchased bonds for cash, although not shown in her books or in her checks, or by withdrawals from her bank accounts, and he consequently added those amounts as unreported income, which accounts for the fact that his income figure is greater in one year than my figures."[1]

At Pages 621-2 of the Transcript, Mr. Tormey testified that the figures in the Government's computations could not be obtained from the defendant's books and records in evidence. Other matters determined by the investigators, outside the books and records in evidence went into the accounts of the prosecution.

At Page 640, the *surprise* of defense counsel and

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[1] It should be noted that during War Bond drives, the Defendant bought and gave to winners by chance some war bonds to customers. This would account for these bond purchases, but they would be a cost of doing business and not income for her, for she disposed of them to customers.

the testimony of September 2, 1947 by the attorney of the Penal division having misled him, is shown:

"Mr. Crittenden: I have a question or two. I want to state to the Court before I start in that I am greatly surprised in this: At the time we asked for a bill of particulars, particularly on September 2, 1947—

The Court: Just a moment. You proceed with this witness. I am not concerned with what you have in mind. This witness is on the stand. Examine this witness and proceed to do it now.

Re-direct Examination

Mr. Crittenden: Q. Mr. Tormey, you say the ordinary audit requires external verification in addition to the books and records?

A. Wherever it is possible.

Q. You go out and made an independent investigation?

A. It is left to the judgment of the investigating officers.

Q. You go out and make independent investigations?

A. Oh, yes, we check bank accounts, we check the accounts of vendors or wholesalers or department stores. That is customary procedure.

* * * *

Q. And you in making up accounts rely on this external investigation as part of the audit?

A. If it lends itself to being proved, it seems reasonably, if their records are kept in normal

business affairs and the people responsible will testify that they are correct, we certainly do as to them."

At page 646 of the Transcript the surprise and misleading of defense counsel was put into the record.

B.

Counsel for defendant was faced with a new, different and unrelated evidence by Agent Krause of another income than charged in the indictment and different in every respect than the evidence in the first trial, except it was presumably computed by the same accounting method from the same basic data. The alleged corrected business income and alleged other income and alleged deductions and expenses were different.

Request to see the work sheets, the supporting documents for Exhibits 28, 29 and 30 was made by defense counsel of the counsel for the prosecution during the noon hour recess the day Krause and the prosecution sprang the new accounts. It was refused.

While Krause was still on the stand as a witness for the government, demand was made in open court, an order was requested of the Court for permission to examine the work sheets, and a request was made for an order to put them in evidence. (Transcript 447-452)

The requests were denied.

The defense counsel was permitted to look at the work sheets of Krause for the ten minute

afternoon recess, glancing from January to May 1933 very hastily. (Transcript 455)

At the start of the morning session of March 31st, defense counsel reported to the Court that he had not yet had an opportunity to examine the work sheets of the Government's current account and figures, except for the few minutes at the afternoon session recess. Transcript 478. Counsel for the defense requested the papers, from which Mr. Krause testified, be introduced into evidence. Mr. Campbell told the court it would be available when Mr. Krause arrived and the court ruled it would be available.

At the end of the morning session on March 31st, demand was made of Government counsel for the work sheets showing deductions allowed and how the income was arrived at. It was denied.

At the commencement of the afternoon session of March 31st, counsel in open court reported the demand and stated he had not seen them. The court ordered defendant to proceed with the case. Transcript 531.

At the end of the day's session on March 31st, defense counsel requested an order to enable him to examine Mr. Krause's records from which he testified. The court observed he has never known the government to withhold information within reasonable bounds. Counsel for defense stated to the Court it was not true in this case and asked for work sheets showing disallowed items, those showing deductions allowed and the work sheets show-

ing the far greater income than computed by Agent Tormey. The Court observed if he went into the work sheets the jury might become uneasy and he didn't see how it could be done and adjourned. Transcript 594-595. We might note that a jury trial is not like the legendary justice of the peace who only permitted one side to argue a case because when he permitted both sides, he became so confused he had a hard time making a decision.

On Transcript Pages 527-8 defendant requested Mr. Krause's work sheets for handwriting comparison as an exemplar. Request for an order to deliver work sheets lying on the table in open court was denied.

On the morning of April 1, 1948, counsel for defendant on Transcript Pages 646-7, stated the surprise of learning that the government's figures involved matters determined by outside investigation by the government agents and not confined to the records and books in evidence contrary to the sworn testimony of government Attorney Siegel on September 2, 1947; which would have been apparent from the "work sheets" of Krause if put into evidence and counsel again stated he had asked for these accounts. The Court refused them.

On April 2nd, during defendant's attempt to prove the various larger items of expenses, Counsel for the prosecution contended Krause had allowed all items of expense for business entertainment. Transcript 724. Defense counsel stated he did not believe that was a fact, that the exact figures were

demanded as to what was allowed and what was disallowed and it had been refused. The Court thereupon instructed the jury to disregard arguments of counsel and ordered the case to proceed. Obviously some deductions somewhere had been disallowed, by an examination of the total deductions testified to by Krause and the items appearing in the defendant's books and records. The items allowed and disallowed in the Krause computations remained and still remain a mystery, despite every effort of the defendant to determine them during the trial.

At Transcript 755, defendant attempted to testify as to certain expenses attendent with the business operations.

The Court remarked that he was not concerned with the services performed by the defendant's sister who was brought to California in 1943 to assist with the business. Defendant sought to show the travel expenses of the sister were connected with and deductable as a business deduction. Mr. Campbell stated they were allowed. Defense counsel stated he had no way of knowing they were allowed, that consistant demands were made to see the Government's papers and they were seen by counsel at but one recess on one day. The Court thereupon recessed the trial to handle other matters.

C.

The items of "net income from bar" and "rental income" as charged in the indictment are ob-

viously the mathematical differences between unknown items totaled together as gross income and unknown items totaled together as deductable expenses, depreciation, losses, etc. The ultimate difference known as "net income from bar" and "rental income" thus, does not appraise the defendant of the nature of the charges, nor of the proofs nor whether additional income is sought to be charged to her, nor whether certain deductions are claimed as disallowed, or another base or rate of depreciation is sought to be proved, on any or combination of these matters.

The prosecution then brings in proof by its witness, an agent investigator, who testified he computes the defendant's income at a certain figure and deductions at another figure whose mathematical difference is different from that charged in the indictment by a substantial proportion.

Upon a second trial, on the fourth day, another investigator agent takes the stand and testifies to a substantially different and separate set of figures. Obviously if the same basic data and same method of accounting were used, such substantial differences and increase in gross receipts would require an analysis and investigation into what items went into these totals. Demand to inspect the papers from which the witness testified and demand to produce them for evidence were first recognized as valid, then met with passive resistance and finally wholly denied.

Near the end of the trial it was learned that

these figures of the Government were not confined to records and books of the Defendant but were based upon investigation.

This is a trial where an agent testifies that he has investigated the defendant and finds her guilty. Asked as to the factual matter of his conclusions and what goes into it, it is refused and the court sustains the refusal.

The denunciation of the accused by the government agent based upon unknown series of alleged facts, from unknown investigations and unsworn statements of unknown third persons is the prima facie case. The defendant wishes to prove facts in her defense and the government contends the investigator has considered and allowed these facts to arrive at his conclusion.

Gone is the constitutional prerequisite of due process, Fifth Amendment, U. S. Constitution. Gone is the requirement of an indictment sufficient to appraise the defendant to prepare her defense and to cross-examine the witness or government agent against her. Gone is the requirement that these unknown parties giving ex parte oral or documentary testimony of receipts and disbursements to the investigator, shall confront the accused, be sworn and subjected to cross-examination. Gone is the right to put on a defense. The denunciation of the government agent presumably initiates the trial and charges and suffice to convict. "Trial by denunciation" is no longer a term confined to a tyranny in Continental Europe but a

reality on our jurisprudence. Woe, to the unhappy taxpayer who does not provide an apartment for the agent's blonde female associate! Woe to the unfortunate citizen who crosses a petty Internal Revenue agent. He or she will be denounced and the denunciation will be the stamp that results in conviction of a felony, fine, imprisonment and disgrace and disability of a convicted criminal.

E.

Defendant in the case at bar, is in a similar position to the defendant in *U. S. v. Empire State Paper Co.,* (DC NY) 8 Fed. Supp. 220 where each was confronted with alleged correct figures in the income tax evasion indictments, and there the court said, in granting a motion for a bill of particulars:

> "The difficulty of the defendants in their defense appears to have arisen from the fact that the figures set forth in the indictment as going to make up the true income of the defendants are not to be reconciled with the books of the defendants to which they have always had access. Counsel for the government admits the computations which appear in the indictment are not made up of figures taken from the books of the defendants. The defendants are, therefore, in the more or less difficult situation of being confronted with an aggregate amount set forth in the indictment from which a true return should have been made without knowing in advance of trial what details have been used by the government expert accountants in making up these gross figures. As it appears to me, this will be a situation most embarrassing to the defendants upon the trial, and in addition of placing them

> in a position lacking entire opportunity to prepare defenses for the charges embodied in the indictments as to the source of receipts and expenditures with which under the statement of counsel for the government they are entirely unfamiliar."

The purpose of an indictment is to inform the accused sufficiently of the facts constituting the alleged offense to permit her to prepare her defense, to advise her counsel of the facts to permit a defense, intelligent cross-examination of government witnesses and to enable the defense to test and rebutt their testimony; to permit the Court to determine the issues and to rule on the admissability of evidence, and to permit a plea of res judicata upon a final determination of the proceedings.

As the indictment stands, without the required information by the bill of particulars, the defendant did not have and does not now have the slightest notion or idea of what sum or sums, or from what source or what items went into the charge against her, or what deductions and what items went into deductions to arrive at the "net income from bar" or "rental income" in the indictment; or for that matter what went into the figures to arrive at the various starting figures in Exhibits 28, 29, and 30.

Although the indictment in each count states "Gross Income", it expresses all figures under them as "net income". It is elementary that a figure of gross income for each year must have

been arrived at and certain expenses and deductions subtracted from that figure to arrive at certain figures alleged in the indictment as "net income from bar", etc. The taxpayer defendant could not commence to examine and compare her figures in her book and records against those charged in the indictment until she knows what gross receipts she was charged with having received and what expenses and deductions have been allowed in arriving at the figure in the indictment.

As the Court stated in *U. S. v. Empire State Paper Co.,* (DC-NY) 8 Fed. Supp. 220, in granting the motion for a bill of particulars in an income tax evasion indictment:

> "The Court has in mind from observation and experience in income tax cases, that the figures of expert accountants even from the same department often vary greatly in conclusions arrived at, so that it is frequently most difficult for the taxpayer not skilled in the art of expert accountancy to ascertain what a specific charge, either civil or criminal, may be on the part of the government."

So in the case at bar, there are any number of items upon which we dare say, not two certified public accountants skilled in personal income tax work would agree on every item, having been added together in total figures; and from that total figure, another column of figures or items, even more subject to disagreement by even such skilled accountants, had been deducted. The conclusions thus arrived at are the "net profit from bar" and "rental

income'' which are the alleged ultimate ''facts'' of the indictment, added together to become ''gross income'' in the indictment.

If the accused were guilty, and had received the monies sought to be charged to her as evaded income, she might be presumed to have known the various transactions of her business, whether conducted by her personally or through agents, servants and attorneys, even though taking place up to more than five and a half years before.

If the defendant were guilty, and she is entitled to the presumption of innocence during the indictment and up to the time of judgment, she cannot know, suspect, nor imagine what the elements of the offense stated in the indictment could be—until surprised by the proof at the time of trial. She cannot know the gross receipts she is charged with receiving, until surprised at the trial, and then not the items attempting to make up that item. She cannot know the deductions and expenses she may be credited with in arriving at ''net profit from bar'', except to be surprised at the trial with a lump sum figure and never permitted to find out the items going to make it up, to know which were omitted or disallowed. The indictment merely charges the mathematical difference between the sums of these two. To charge the defendant with knowledge of this alleged offense, is to determine her guilty before trial.

Such a rule as contended by the government in it offered bill of particulars that the elements of the offense are within the knowledge of the defendant is to end the requirement of the Fifth Amendment United States Constitution that an indictment must be presented against a person. So an accused charged with murder, cannot complain of the failure to name any of the details or facts, for the defendant is presumed to be within the possession of the facts or means of determining or ascertaining the particulars including the name of the alleged deceased, the time and place of the offense, etc. A person charged with larceny is in the possession of the means of ascertaining the particulars—the time, place, ownership, nature and extent of the property involved, by reason of the fact that the defendant was present and knew these facts and has the loot from his wrong. See Ninth Circuit decision of *Foster v. U. S.,* 253 Fed. 481.

It was stated in *U. S. v. Allied Chem. & Dye Corp.,* (DC-NY) 42 Fed. Supp. 425, in granting a bill of particulars:

> "One indicted of a crime is presumed not guilty and that he is ignorant of the supposed facts upon which the charges are founded . . ."

In an income tax evasion case, when it appears that the indictment does not inform the defendant with sufficient particularity the defendant is entitled as a matter of right to a bill of particulars.

The Third Circuit in *Singer v. U. S.,* 58 Fed. 2d

74, in holding that a conviction for wilful evasion of an income tax be reversed, held:

> "When it appears that the indictment does not inform the defendant with sufficient particularity of the charges against which he will have to defend at the trial, he is entitled to a bill of particulars, if seasonal application is made therefore. The Defendant may demand this as a matter of right, even though the indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced bad on a motion to quash or demurrer; where the charge is couched in such language that the defendant is liable to be surprised or unprepared. Tilton v. Beecher, 59 N.Y. 176, 184, 17 Am. Rep. 337; Watkins v. Cope, 84 N.J. Law 143, 147; 86 A. 545; State v. Bove, 89 N.J. Law 350, 353, 116 A. 766; United States v. Eastman (DC) 252 Fed. 232; Wilson, et al v. United States, 275 Fed. 307, 310 (CCA-2); Bodine v. First National Bank of Mercantville (DC) 281 Fed. 571; Filatreau v. United States, 14 F. 2d. 659 (CCA-6); Lett v. United States, 15 F. 2d. 686 (CCA-8); O'Neill v. United States, 19 F. 2d. 322, 324 (CCA-8)."

The Court in that decision pointed out prejudice suffered by the defendant from the mass of irrelevant and prejudicial evidence admitted for failure to require a bill of particulars; and the surprise and prejudice suffered by the defendant from the failure to require a bill of particulars. It was also commented upon that a defendant could not remember details of financial transactions after five years (a comparable time in the case at bar).

The Ninth Circuit in *Maxfield v. U. S.*, 152 Fed. 2d. 593 said:

> "It is claimed that the Court was in error in denying appellant's motion for a bill of particulars; and Singer v. United States, 3 Cir. 58 F. 2d. 74, is relied on as authority. In the Singer Case the indictment failed to distinguish net from gross income; and the accused were surprised by the government's evidence to the extent that long recesses had to be granted on several occasions. There, also, the books of the accused were in the hands of the government and were withheld from the use of the defendant.
>
> No comparable situation existed here. . . ."

In the instant case we have the elements of the Singer case, and the elements missing from the Maxfield case: In the case at bar the indictment confuses "gross income" and "net income" placing "net profit from bar" as an item of "gross income". We have the element of surprise. We have two separate, distinct and different accounts offered by the prosecution, one at the first trial, and the springing of the second computations and accounting in the second trial in its fourth day. We have the partnership book in the hands of the government. In addition, we have unknown items, from unknown third person's records, determined by an investigation from which all testimony was restricted on cross-examination as to the investigation, its conduct, and extent. These items make up part of the income, and presumably part of the deductions in the government's second account and

computations, in addition to unknown items of alleged bond purchases determined from inquiry of some government bureau, which are expenses of business and not income.

The substantial variance between the allegations and the proof are certainly not the differences covered in the Maxfield decision. The indictment charges as an item of "income from bar" as an item of "gross income" in the indictment the sum of $2,785.92. Krause in Exhibit 28 sets up net income of the business at $172.13. This is the sole count upon which a verdict of guilty was returned, and upon which the judgment appealed from is predicated.

The obvious reason that the prosecution refused the bill of particulars, was that it was calculated to surprise the defense. It did. On the second trial, on the fourth day of taking testimony, the prosecution brought forth a new and different contention based upon a new and different account and computations. Obviously, it was intended to surprise the defendant, having offered another and separate account and computations as the absolute truth at the first trial. The prosecution refused the defense the right to inspect the work sheets to determine what went into these items, for they knew it could not stand searching analysis or adverse inspection. The prosecution refused to put the work sheets in evidence, because if the jury should see what made up the items or the computations of the Krause figures, it would discover the

fallacies, errors and omissions of the computations. Any method of accounting, not used by certified public accountants, and likely to overstate income, which upon the same basic data would result in such greatly different "corrected business income" as shown by the two government's agent accounts and computations, cannot stand the scrutiny of the defense nor of the jury.

There is no good reason why the various items making up the alleged "net profit from bar", "rental income" and allowed deductions should not be furnished the defendant, by a bill of particulars, upon timely demand. Those that are admitted correct need not be gone into by the defense. Those that are improper can be made the subject of issue in the trial. Disallowed deductions are known by those that were omitted from the allowed deductions, and the issues are narrowed. The defendant will not be surprised. Methods of computation appear at once, and where they overstate income, can be shown to the jury. The only reason for withholding is that they cannot stand the test of examination, and must be withheld, and the totals sprung as a surprise to the defendant.

By this withholding, the trial lacks the essence of fair play, and the defendant must go into the details of the three years of various transactions, unless precluded by the court from putting in this defense. Any tax income trial, without such a bill of particulars, becomes a trial by ordeal, in which sheer weight of the defense means financial ruin,

regardless of the outcome. Unless one has been fortunate enough to have considerable liquid assets, one must forego the expense of a detailed audit by certified public accountants as proof in the defense. The defendant, unfortunately, did not fall within the classification of one who could afford such an expense. If she had been guilty as charged, she might have had the means to employ certified public accountants for such a detailed audit. Tax liability in matters of considerable importance and complexity are tried in a matter of hours before the United States Tax Court by a narrowing of the issues through the tribunal's procedure. The new Federal procedure permits the reduction of a cause to its real issues. See Federal Criminal Rule 7(f) and the note under it "This rule is substantially a re-statement of existing law on bill of particulars".

The defendant merely asked for the items making up the amounts charged as "net profit from bar" and "rental income", and items making up deductions of business expenses and deductions. It is absurd and preposterous to expect the defendant to prepare for a trial with less, in view of the showing for the bill of particulars, or for the court to determine the issues and the relevancy of the testimony without it.

We note merely as a matter of interest that the present English criminal procedure requires that a witness not called at the preliminary hearing, cannot be called as a witness for the prosecution

without the defendant being properly informed of the expected testimony. Nor in the Continental Law countries is a defendant surprised, for each witness is thoroughly interrogated in the presence of the accused by the Judge d'Instruction prior to the trial of the accused. Certainly, our system of jurisprudence is not calculated to surprise the accused at the time of trial.

Defendant is entitled to know exactly the nature and extent of the crime of which he is accused, and where the indictment is substantially good, but it appears the defendant cannot properly prepare his defense without a bill of particulars, the Court will order the prosecution to furnish it.

31 Corpus Juris, page 750, Indictment & Info. Sec. 308. It was said in *U. S. v. Allied Chemical & Dye Corp.,* 42 Fed. Supp. 425:

> "A bill of particulars will be ordered whenever it appears to be necessary to enable the defendant to meet the charge against him or to avoid danger of injustice. Coffin v. United States 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481. If the indictment is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, he should apply for a bill of particulars. Rinker v. United States 8 Cir. 151 F. 755, 759 . . ."

The Ninth Circuit stated in *Perez v. U. S.* 10 F. 2d. 352, where objection was made to the sufficiency of the indictment:

> "If further information as to the details of the charges were desired by the plaintiff in error, he had his remedy by applying for a bill of particulars."

The Ninth Circuit in *Shaw v. U. S.* 131 F. 3d. 2d. 476, involved an indictment for sending unregistered securities through the mail:

> "If the accused, for purposes of his defense, desired a more particular detailed description of what persons were engaged in the process of carrying through the mails, he should have moved for a bill of particulars."

The Supreme Court in *Kirby v. U. S.,* 174 U. S. 47, 19 S. Ct. 574, 43 L. Ed. 890, involving an indictment for receiving stolen property (stamps) said:

> "If it appears at the trial to be essential in the preparation of a defense that he should know the name of the person from whom the government expected to prove that he received the stolen property, it would be in the power of the Court to require the prosecution to give a bill of particulars."

As the case turned out, the government attempted to prove a far different offense than the one charged in the indictment. It is considered a basic concept of criminal justice, as well as a basic concept of fair play, that the proof at the trial should substantially approximate that charged in the indictment.

This is not a case like that of *U. S. v. Skidmore,* 123 F. 2d. 604, where a bill of particulars is sought solely for calculations upon matters admittedly confined to the defendant's books, for here it was shown by the affidavits in support of the motion for a bill of particulars that no matter what methods of computation or estimation were used, the income

from the defendant's book and records more closely approximated the reported income of the defendant and not the income alleged in the indictment. Indeed we should note that the government's proof in the Krause computations suffered from the same vice; yet the Krause computations are based upon "basic data" not confined to the defendant's book or records.

Much Admissible Testimony was excluded during the Trial.

1. The divorced husband of the defendant was called by the prosecution as a witness. The prosecution contended that although the parties lived together from their marriage in March, 1942, to their separation in July, 1943, that there could be no community property from the earnings of the parties during the marriage, though residents of California. In 1943 there was an action for divorce filed in July by the defendant alleging no community property in the complaint; a default, and the interlocutory decree was silent. The divorced husband sought to set aside the default, and consulted counsel, and verified a pleading claiming community property. The question as to the contentions of the husband and his claim of community property on the proceedings to set aside the default was excluded upon objection of the prosecution. Transcript 174-175a, Suppl.

2. The prosecution called a disgruntled former bartender of the defendant to testify as to amounts of sales on several big days; he claimed he counted

the cash in the cash register at the end of the day. At the first trial he had testified to having drunk about 20 regular drinks of bourbon whiskey each day he was working for the defendant as her bartender. To bring out the condition of the witness at the end of a day, and to permit the jury to understand the weight to be given to such a witness' testimony, he was asked as to whether at the time he testified he drank during the day, and he testified he did. The prosecution objected to the question as to the number and amounts of drinks and the court sustained the objections. Tr. 204-6, and Suppl.

3. The prosecution witness Shannon testified as to the two periods of employment—the first trial he said the former period ended in 1943 and in the second trial, he placed it all in 1942. He testified that the biggest daytime sales was $142, a day shift, during a "wake at Dugan's". To impeach the witness' veracity, he was asked if the wakes were held during the day or night (for the night was the time of larger volume of bar sales, and wakes are held at night). The Court precluded this line of questioning. (Tr. 196-7 and Suppl.)

4. The Witness Shannon testified as to volume of sales from money in the cash drawer of the register. Defendant was interested in showing that the amounts Shannon testified to was the gross sums and including the opening amounts of $25 to $50 which should be subtracted to arrive at

actual gross sales. This cross-examination was not permitted. Tr. pg. 203, and Suppl.

5. The testimony of prosecution witness Washauer of the Internal Revenue Bureau on direct examination was that the investigation started as the result of an "anonymous letter". (Tr. pg. 19.) On cross-examination it was brought out that the letter was signed by some name (Tr. page 27); however, the witness claimed there was no such person as the name signed (Tr. pg. 28). The defense demanded the original as the signature might be misunderstood or the copy not a correct one (Tr. 27-8). The next morning, the letter was produced, but the court sustained the prosecution's objection it was privileged (Tr. 85-8) and suppl.) and the document is among the exhibits on appeal in a sealed envelope. If it were an anonymous letter as the prosecution contended, it would not be a privileged communication, for the identity of the informer would not be disclosed; and there is no contention that the fact of the obtaining of information from some unknown informer is privileged, nor the nature of the information. The evidence suppressed must be presumed to be adverse to the defendant.

6. Government Witness Bosserman was an accountant who solicited the defendant's accounting business, was hired by her to prepare her tax returns, who took her records and prepared the returns which she relied upon. These are the subject to the three counts of the indictment. On cross-

examination the witness testified he threw out a number of deductions in computing the returns which she could have taken. Asked if he had given the government the breaks in making out the returns, objection was made that the cross-examining counsel was putting words into the witness' mouth! And the objection was sustained. Tr. 222-4 and suppl.

This is just what a leading question is, and permissible on cross-examination.

7. Bosserman testified on the second trial that he computed the 1942 partnership return from the "Gray Book", although on the first trial he had testified he had not used the "Gray Book", and before the first trial had conferred with defense counsel in their office about the returns and the "Gray Book". On cross-examination Bosserman was asked about having said he had not seen the "Gray Book" and the prosecuting attorney objected as the cross-examiner is putting words in the mouth of the witness! The objection was sustained (Tr. 249 and Suppl.). Certainly leading questions by defense counsel of a hostile witness are permitted, and recognized as proper.

8. Bosserman was asked on direct examination about his informing his accounting client that gambling winnings were taxable, and the alleged conversation. At the first trial Bosserman had testified that such a conversation was not had until late in 1945, and defense counsel showed the transcript of the testimony and the witness testified he

believed he did so testify. Thereafter the prosecution objected to any questioning about the defendant's reply that she was surprised to find it was taxable; to permitting the witness to explain; or to reading into evidence of the prior testimony that was inconsistent. All of this the Court sustained. Transcript 252-4 and Suppl. Impeachment of Bosserman's testimony that the defendant told him nothing about the income from the machines was also prevented, by prior testimony at the first trial was objected to and some objections sustained, and the court refused to make a ruling, ordering defense counsel to proceed. Transcript 255-8, and Suppl.

9. The letter written by Bosserman to defense counsel before the first trial that the client did not have the slightest idea of income tax or what was taxable and what was not; showing complete reliance upon Bosserman's professional services in the tax returns in the case was offered, the signature proved by the writer, Bosserman. Upon objections of the prosecution, its admission was refused by the Court. Bosserman had testified that the defendant had not disclosed to him her reliance upon him and his knowledge that she had no concepts of income tax, and the letter of the accountant was offered for impeachment of this testimony of Bosserman. It was also offered to show that the defendant relied upon his professional services and acted in reliance on them, and he knew it. This letter was marked for identification, Exhibit C.

10. The defendant alleged in her complaint for

divorce in July, 1943, that there was no community property on that date. Soon after she acquired the full interest in the bar business on July 16, 1942, her husband left his job with the Dacus Oil Co. and spent full time working on the bar. The Prosecution computation showed that the net income from the bar for the period of July 16, 1942, to the end of 1942 was $172. To show that there had been and was community income, but much of it spent up to the time of the divorce, so that the allegations of the complaint would not mean that there was never any community income during the status of marriage, defense counsel asked the defendant as a witness what property she had at the time of the separation from her husband in 1943. She testified she had her car and her business, some money in the bank and owed some bills. She was asked the approximate amount she owed at this time; it was objected to and sustained. Transcript 761. She was asked if she discussed the allegations of community property in her divorce complaint to her lawyer, Mr. Hyman. It was objected to and sustained. Tr. 761. A series of questions as to the community property allegations, the divorce, etc., and the advice of her counsel as to the effect of her allegations when she brought the divorce action were all sustained. Tr. 762. The doors to any defense or effect of the community property law or the income of the husband to be charged against him and not reportable by the defendant wife, particularly in the year 1943 when

separate returns were filed, were closed to the defendant.

11. The defendant gave a rough guess inventory to the government agents during the investigation, prepared for her by others. The Government offered this "best guess at the time", made more than a year after, as proof of actual inventory. A question to bring out how and who made the alleged inventory, to give the facts upon which the jury must determine how accurate it was and what weight should be attached to it, was objected to by the prosecution, and the court sustained the objection. Tr. 819.

12. The prosecution, in an effort to prejudice the jury against the defendant, went into great lengths about entries in the year 1944 books of gambling losses, as gifts to Red Cross, Good Causes, etc. The defendant took the standard deduction of $500, which was allowed regardless of the amounts given for charities, losses or other deductions. It would not make the slightest difference in this case that gambling losses be entered as charities, if the tax showed the losses deducted from gambling winnings. Rather than to defraud the government, the taxpayer by doing this would be injuring herself. With the standard deduction taken, entries of gifts to charity are mere surplusage. There being gambling winnings, then gambling losses are deductions, no matter by what name they be called. As to 1942 and 1943, there is a 15% limitation on charity donations (which was not

exceeded in any event by any theory) and gambling losses are entirely deductible without limitation of percentage up to the amount of gambling winnings in the year. Where it is contended the defendant had substantial gambling winnings, it would not make any difference which it were called, charity or gambling losses, for it would be deductible items. Defense objection to the line of questioning calculated solely to appeal to the prejudices of those composing the jury, for calling a deduction allowable in any event by whatever name it might be called, was overruled by the Court. Tr. 828.

13. Upon cross-examination of the defendant as a witness, upon the issue of a substantial part of the inventory of liquor having become unmerchantable, and therefore to be written off in the accounting period it became unsalable, the prosecution listed the inventory, US Exhibit 34, giving the merchandise by name, brand and quantity, and questioned her. On re-direct examination, the defendant was asked as to certain brands in the inventory. She testified that the YPM whiskey had to be given away; it was on the premises and she didn't make up that report. Asked about Rico Rye, it was objected to as immaterial; and the court sustained the objection. Asked as to the brandy on the inventory, she said she could not sell it over the bar. The prosecution objected and the objection was sustained. Asked if she had any call for these cordials in the inventory, it was objected to and sustained. Tr. 840-1, and Suppl.

Merchandise that becomes unsalable is to be written off in the accounting period in which it becomes unsalable.

3 *CCH. Federal Tax Reporting Service* 609, Sec. 120 et seq.

14. Defense counsel assigned as error the prosecution counsel's interposing of objections to extract a prosecution witness from a difficult position. (Tr. 36.) The Court reprimanded defense counsel before the jury for assigning error. The objection of the prosecution was too obviously ill founded to justify its imposition, and the argument advanced in the objection bore no relation to the objection. Such conduct is a mere trick at best, and misconduct of counsel. When it becomes grounds to censure defense counsel for assigning as error conducts of the prosecution which defense counsel believes in good faith to be well founded, and which must be specified in the record, and leave an unfavorable impression in the jury's mind that defense counsel, not prosecution counsel, was acting improperly, then it becomes dangerous to protect an accused's record. This act of the Court could not but have had prejudicial effect upon the defense of the charges, and damaged the defense irreparably.

The Written Judgment does not conform to the Judgment pronounced by the Court.

The Court pronounced the judgment and sentence (Tr. 906):

"The Court: Well, it is the sentence of the Court and it is ordered by this Court that the defendant be committed to the custody of the Attor-

ney General or his authorized agent or representative, to be imprisoned for a period of six months and pay a fine of $5,000. And at the end of that period of time, you will have plenty of time to look into the civil aspect and the criminal aspect as well, and determine whether or not we should go on with the other two counts under the indictment."

The judgment entered in the record specifies not only the 6 months imprisonment and $5,000 fine, but also the imprisonment of the defendant until the fine is paid.

The written judgment should conform to the judgment pronounced in court.

Hill v. U.S., 298 US 460, 56 S. Ct. 760, 80 L. Ed. 1283.

Numerous important instructions were requested by the Defendant but not given by the Court.

The instructions requested and not given, are set forth at length in the appendix.

1. The defendant purchased the Baker St. apartment house for $7,000 cash and the property was subject to a deed of trust for $10,000 made by the vendor to another. The mortgagee insisted upon collecting and applying all the rents, as a condition of the sale. The defendant requested an instruction following *Hilpert v. Commissioner,* 5 Cir. 151 F. 2d. 929 that where the mortgagee under an assignment of rents, collects the rents and applies them upon an obligation under which the defendant has no legally enforceable liability upon the debt, such is not income to the taxpayer. This

was covered in Defendant's proposed instruction No. 1.

In line with this, Defendant's proposed instructions No. 2 and 3, setting forth the law of California, CCP 580b and *Stockton Sav. & Loan Bank v. Massanet,* 18 Cal. 2d. 200, 114 P2d. 592, that there is no personal liability for a purchase money mortgage, particularly one in existence and the land purchased subject to such a mortgage of another.

3. There was considerable testimony upon questioned writings and who wrote them. The federal statute, 28 USCA 638, was requested as Defendant's proposed instruction No. 4; it was agreed upon by the prosecution as a proper instruction. The Court did not give it, nor anything concerning the province of the jury in making comparisons.

4. There was some testimony offered by the government as to inventories, and some of the testimony of the agent Krause as to income using inventories. A "cash basis" was used by the taxpayer in making her returns, and she was entitled to an instruction as to the "cash basis". None was given. Proposed Instruction No. 5 was refused.

5. Defendant's proposed instruction No. 6 was not given. There was no instruction given stating that the prosecution had the burden of proof to prove taxable income, and gross receipts are but one item going to make up taxable income.

6. Defendant's proposed instruction No. 7 based upon *Hargrove v. US,* 67 Fed. 2d. 820 was not

given. There was testimony as to the belief of the defendant as to certain items not being taxable. An instruction should have been given that honest or bona fide belief of the defendant at the time of making her return involved in the indictment that certain income was not taxable, or mistaken concepts of law or of accounting or of taxation, negatives the specific intent required as an element of the offense. There was no instruction given covering this point and defense.

7. Defendant's proposed instruction No. 8, based upon *Hargrove v. US,* 67 F. 2d. 820, was requested, covering the rule that one is ordinarily presumed to know the law has no application in the offense charged; ignorance of the law is a defense, and the defendant must do the affirmative wrongful act charged knowing it was a violation of the specific law. The Court garbled this proposed instruction into one that the defendant could not be found guilty unless the jury found she knew that the law required her to file true and correct income tax returns! Specifically, the defendant did not know what was or was not taxable income, and was not informed until after the 1944 returns were filed that gambling income was taxable, although she deposited that income openly in her bank account, and it was from that source that the agents claim to have picked up the source of income.

Proposed Instruction No. 9, following the Hargrove Case that a person was not guilty of a felony within the provisions of Sec. 145b because the taxpayer had a mistaken concept of what was or was

not reportable income, or allowable deductions, or because of forgetfulness at the time of making the return, was not given.

8. Defendant's proposed instruction No. 10, covering the doctrine of respondiat superior not being applicable to criminal cases; and a principal is not responsible for the criminal acts of an agent unless there be command, direction or consent to the doing of the very act, was not given. This is clearly the law; and the defendant was sought to be convicted for the acts of her accountant, Bosserman, and for the acts of her husband in closing the register and giving her the totals which in many instances were items entered in the "black book".

People v. Armentrout, 118 Cal App. 761, 1 P 2d. 556.
Paschen v. US, 70 F 2d. 491.
Noble v. US, 3 Cir. 284 Fed. 253.

Defendant's proposed instruction 11 clarifies the above instruction as to the meaning of "respondeat superior", and applies the rule. It was not given.

9. Defendant's proposed instruction No. 12, based on *Cooper v. US,* 8 Cir. 9 Fed. 2d. 216 on clerical errors of employees, accountants, etc., in making the return not being a criminal responsibility of the defendant, was not given. Nor was 13, which combines the rule of the Hargrove case that the intent must be present to do an act knowing the law denounces it.

10. The various instructions proposed by the defendant based upon the *Spies v. US,* 317 US 492,

87 L. Ed. 418 were not given. Proposed Instruction No. 14, not given, was taken in substance from the Spies Case and the one which the Court held should have been given. Proposed Instruction No. 32 as to wilful failure to pay a tax was not given. Proposed Instruction No. 33, that an affirmative wilful attempt is not presumed but must be proved, and the burden being upon the prosecution, was not given. Proposed Instruction No. 34, which is virtually the language of the Spies Case decision, with a few omissions where it is not material, was also not given.

11. A number of instructions involving community property were requested. It was a material law in the case at bar, and materially involved the defense. A very limited instruction was given, which could not but have misled the jury. The facts are not denied, and indeed the prosecution's own case proved that the defendant was married in March, 1942, to Mr. Jost; lived with him until July, 1943, in California, when they separated and an interlocutory decree was entered in July, 1943, silent as to any property; and the final decree dissolving the community was not entered until the middle of 1944, also silent as to property. It would be impossible to determine the wife's income without reference to the law of California concerning husband and wife, and their respective interest in property acquired by either of them or by both during their marriage. It is interesting to note that the Indictment 1st count, charges the wife with *all* the earnings of her husband, Jost, earned by him

prior to their marriage in 1942 as well as all subsequent to their marriage—$1380. So does the Krause computations and account, Ex. 28.

As is the usual practice in divorce cases, the wife claims everything she has in her name or possession at the time of filing the divorce as her separate property, relying upon the presumption in the code. Counsel for plaintiff wives in divorce actions know that often the husband will not contest, and default. Thus there is no problem for the court to award the property, as there is if it is alleged to be community property. If it is contested, the presumption of property in the name or possession of the wife, must be overcome by proof. This is just what the defendant did in her divorce action and the husband defaulted.

A proposed instruction, No. 56, following the decisions of *Brown v. Brown,* 170 Cal. 1, 147 P. 1168, and *Loraine v. Loraine,* 8 Cal. App. 2d. 687 48 P. 2d. 48, was proposed, and not given. If the wife claimed the property as separate in the divorce complaint, there was a default, it was a contract between the parties, that all community property pass to the plaintiff wife as her sole and separate property.

Proposed Instruction No. 16, that property or money acquired from the community upon a separation, is not income to the wife, whether by agreement or judgment, was not given.

Proposed Instruction No. 18 set forth *California Civil Code Section* 172, as to the management and

control of community property, using the words of the statute. It was not given.

Proposed Instruction No. 19, that earnings of a wife while living with her husband are community property, was not given.

Proposed Instruction No. 20, that earnings of the defendant while living with her husband are community property under his control the same as other community property, was not given.

Proposed Instruction No. 21, following *Lawrence Oliver v. Comm'r,* 4 Tax Court 684, and *Periera v. Periera,* 156 Cal. 1, 103 P. 488, as to the allocation of earnings in a business which originated as the separate property of one spouse, and a principal part of the income is attributed to the personal services of one or both spouses, which is community property, was not given. This is the very thing presented in the three years involved. The defendant had a half interest in the Bar, representing a $1000 investment at the start of 1942. She was married in March, 1942, to Mr. Jost. Upon the credit of the community, and earnings of the community saved as of July 16, 1942, the other half interest in the bar was acquired for $1650. The principal income was from the services of the wife and the husband while living together in California for the time in issue in 1942 both from the partnership and when the partnership with Divers was ended.

Proposed Instruction No. 22, following *Roches v. Blair,* 9 Cir. 32 F. 2d 22 that commingled community and separate property so as not to permit the identity of the portion that is community and

the portion that is separate, all is presumed community, was requested and refused. This is the fact in all three years. Surely the income during the time the parties lived together until July, '43, and after their separation was not determined, nor was there any attempt to segregate how much of the bar business acquired after the marriage in March, 1942, nor the increase in its assets as the liquor in the inventory, etc., were community or separate. It was not until late July, 1943, that the interlocutory decree was entered, and not until a year after that in 1944 that the community was dissolved, and the divorce dissolved the community and became effective as a contract between the parties that providing all was solely separate property of the wife.

Proposed Instruction No. 24, that property acquired upon the credit of the community is community property, was not given. In the case at bar, the government's evidence was that borrowed money was used to acquire the second half interest in the bar in July, 1942, for $1650.

12. There was testimony that the defendant acquired some money from gambling in wholly friendly games with competitors. Proposed Instruction No. 26 stated that income from unlawful business is taxable, money obtained in a game of chance undertaken solely for amusement and not as a business is not taxable income. An alternative proposed instruction No. 25 was proposed adding the additional element that the gambling must be not prohibited by law. Neither was given.

Property received by chance, not connected with a business venture, is not taxable.

McDermott v. Commissioner, 150 F. 2d. 585.
Washburn v. Commissioner, 5 Tax Court No. 162.

13. There was much testimony on expenses incurred by the defendant in business entertainment to enhance her bar business. Proposed Instruction No. 27, that it was a deductible expense in arriving at taxable income, was not given.

14. There was testimony that the sister of the defendant worked for her, and received living quarters and accommodations. Proposed Instruction No. 28, that this was an expense to be deducted from gross income in arriving at taxable income, was not given.

15. There was testimony that the automobile was used part for pleasure and part for business, and proposed Instruction No. 29, as to pro-rating of such expense, was not given. The living accommodations shared with the sister is within the same rule.

16. Instruction No. 30, on depreciation and the rate, was not given.

17. Instruction 31 as to employing an accountant was given, but injecting the word "truthful" before the word "book". In view of the prosecution's misconduct in making such an issue of entries of donations in place of gambling losses, which was over a thousand dollars in 1944, notwithstanding the defendant taking a standard deduction where the amounts for charities bears no relation to the

tax; and the amounts were small in 1942 and 1943, and were a deduction in any event; this instruction was most misleading, and erroneous. The error in the books must be as to a matter that would have a direct and proximate connection with the ultimate tax, for it to defeat the defense. In addition it must be such an error that was made with a present knowledge that the error in the books was calculated to defeat and evade the income tax, and with that intent. The instruction as proposed included the element of "relied in good faith upon the tax return" which would negative any such intent. As drawn, the instruction was proper. As given, it was very misleading and erroneous.

18. Proposed Instruction No. 35, on "willful" as defined in *US v. Murdock,* 290 US 389, 54 S. Ct. 223, L. Ed. 381 was not given, but instead an instruction including negligence, that is careless as to the requirement of the law, was given. In tax law, there is a strong difference between "fraud" and "negligence", and the subject of a number of decisions. Suffice it to state that *negligence* is not proof of the "willful" intent under the felony charge of Sec. 145b. This error of the court in the instructions is most damaging to the defendant.

19. Defendant's proposed instruction drawn from *Hargrove v. US,* 67 F. 2d. 820 on "willful and knowing" as used in describing the offense, was not given. The essence of the law is not the doing of a certain act knowing that the act is done, but the specific wrongful intent that is the actual knowledge of the existence of the obligation im-

posed to return a specific money as income, or not to take certain deductions that are the offense. Every taxpayer who files a return does the act "willful and knowingly". It is only those acts done "willfully and knowingly" with an attempt to evade the income, as knowingly misstating income, knowing the correct income, knowing the requirement of law, but who keeps two sets of books, one correct and one for the income tax as a lesser sum, who meets the test of "willful and knowingly" under the statute making it a felony. A taxpayer who keeps daily cash register total for sales tax matters, who deposits all income in bank accounts openly, and then gives the cash register daily totals and the bank account records to an accountant to compute the income tax, is not within the language of "willful and knowing" of the statute, though the return relied on in good faith, prepared by the accountant, is filed with the positive knowledge and positive acts of the taxpayer.

20. Defendant's Proposed Instruction No. 38, based on the *Hargrove Case* requiring every element of the offense to be proved as done with actual knowledge of a specific violation of the income tax law, was not given.

21. Defendant's Proposed Instruction No. 39, requiring a specific intent to defraud be proved, and Proposed Instruction 40 defining fraud, were refused.

22. Defendant's Proposed Instruction No. 42, as to discovery of omission after the return, was refused. There was evidence that after the 1944

return was filed, Bosserman told the defendant to keep records of gambling winnings and losses, and she was surprised to learn it was taxable; but no proper instruction upon this, and the jury might well conclude that she had a duty immediately upon the discovery and not to wait until she appeared with her counsel at the Intelligence Unit to offer to file another return.

23. Defendant's Proposed Instruction No. 43, that a tax liability must exist to attempt to evade it, and the duty was upon the prosecution to prove the tax as an element, was not given. Neither was Proposed Instruction No. 44 that this burden of proof never shifted and the quantum of proof and presumption in criminal matters as to a tax is not the same as in civil cases where the Commissioner makes a determination and it is prima facie correct.

24. Proposed Instruction No. 45, that a taxpayer does not act at his peril of prosecution under Sec. 145b when he returns and reports income which he or she may believe proper, was not given. Neither was proposed Instruction No. 46, that if a taxpayer entertains a doubt as to what is or is not reportable or deductible expense, he is free to resolve all doubts in his or her favor; that regulations are not always in accord with judicial decisions, and it is not the intent of Congress under Sec. 145b to punish such acts as a felony.

It might be pointed out that there are numerous times that a taxpayer or his advisor holds doubts as to the legality of a regulation of the Commissioner. The practice is to construe the doubts

favorable to the taxpayer in the return, expecting to take the matter up if raised by the Commissioner on administrative procedure, then to the Tax Court, rather than to pay every possible sum and sue for recovery in the District Court.

25. Proposed Instruction No. 47, covering losses from transactions for profit, not in the trade or business, are deductible, was not given. The defendant suffered fire losses, etc., from her rented flat in 1942 and other losses not connected with the bar.

26. Proposed Instruction No. 48, as to the deductibility of bad debts, was not given. There was evidence that the defendant suffered losses from loans and bad debts in the year 1942 as well as other years. Instruction proposed as No. 49, permitting a reserve for bad debts at the option of the taxpayer, was also not given.

27. There was the question as to whether in the year 1942 in which she and her husband were married in March and lived together in California, filed a joint return, she was criminally responsible for reporting his income under the community property law (over which the law gave him absolute control and disposition), or whether she was merely criminally responsible for her own income, as well as the husband's wages before the marriage. An Instruction No. 51 proposed, following *Cole v. Commissioner,* 9 Cir. 81 F. 2d. 485, was not given.

As the law was enunciated by the Court, the wife having neither control or disposition of community property by law, is criminally responsible

as a felon for failure to return income of the community and her husband need only be divorced from her to be a prosecution witness and avoid his just desserts. How concepts of crimes do vary!

28. The *Current Tax Payment Act of 1943* was covered in Proposed Instructions No. 52 and 53. Not only did the Court refuse it, but on the contrary instructed the jury that the Federal statute did not apply! The last sentence of the Act, Section 6a, reads:

> "This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additional tax for such taxable year are applicable by reason of fraud."

Obviously, the provisions as to conviction could have no application during the trial, and the Court cannot assume the defendant convicted before or while it instructs the jury, for that is pre-determining the case and throwing out the presumption of innocence that is inherent in our jurisprudence. There has been no assessment of any tax, nor for fraud. The Court excluded any evidence that there was no assessment, although if there had been an assessment for 1942 for fraud, it is at least arguable that the Act would not apply. Furthermore, the prosecution contended that there should be no instructions on fraud, as it was contended this action was not sounding in fraud; the prosecution cannot then contend that the instant matter is fraud when this section is asked as an instruction. Certainly, the Court cannot give its instructions in a

criminal case assuming the accused is guilty of fraud for the year in which she stands charged with attempted wilful evasion, merely from the indictment.

This is the so-called "Forgiveness Act" which imposed the duty upon the prosecution witness Jost to report and pay the 1942 tax as part of 1943, and which we must assume he did, for he was married during March, 1942, and lived with the defendant to July, 1943, and the marriage was not dissolved until the final decree in 1944. The prosecution offered him as a witness, objected to all inquiry as to his income tax returns for 1943. The prosecution sought to convict the wife based on community income, under the husband's absolute control and disposition as a matter of law, for a tax forgiven and which the husband, vouched for by the prosecution's production of him as a witness, should have paid and reported in his 1943 return, and we must assume he did.

29. The testimony of both the prosecution and defense showed that the alleged acts for which the indictment was brought and which the prosecution sought to charge as an offense were done by the wife in the presence of her husband; the books were kept during July, August and September, 1942, by the parties working together at the bar business, and the return was signed in their joint presence; they both lived over the bar in the same structure during all of this time. Defendant requested instructions No. 57, 58, 59 and 60 on the applicable law that a wife is presumed to act at

the coercion of her husband. The prosecution called the former husband Jost, and evidently assumed it could not disprove the coercion, for no effort on direct evidence was made to go into it. The defense could not cross-examine in a field not covered by direct examination. The defense did prove that Jost instructed the defendant to open a new book on July 16, 1942, when Diver's interest was bought out; and that some evenings Jost closed the cash register, brought the money and cash register totals to the defendant and she entered them in the "black" book as he gave them to her.

30. Individual directed verdicts for the defendant on each count were requested and refused.

The Court undertook to instruct the jury on all the complicated income tax law applicable in a few short instructions. We find no fault with the brevity, but we do by the omissions of the material issues left completely uncovered by instructions. The Court instructed that earnings of the defendant while living apart from her husband were separate property, leaving open and to inference to the jury that living together it might also be separate property.

The Court gave a formula instruction amounting to a direction to the jury to disregard community property. Purchase of a half interest on the credit of the community is of necessity community property, but the Court erred in stating it was separate. The Court omitted any of the evidence of the prosecution and the defense that Jost invested his salary in the business when he worked

and lived together, in the formula instruction. The Court assumed that and in the formula instruction stated that the proof was that Jost made no claim to community property, when Jost testified at the time of the interlocutory decree he consulted a lawyer, verified a pleading for his lawyer that he claimed community property in the bar, in a proceedings to set aside the default. The formula instruction stated that defendant stated under oath that there was no community property, which was not the evidence. She filed a verified complaint in divorce claiming all she had in her name or possession *at the time of the action* as community property, not that there never was community income.

The Court instructed that a relinquishment of Jost to community property claim was income. This is serious error for relinquishment is a gift, and gifts are not taxable as income. Neither are transfers of community to separate property by agreement or divorce decree taxable income.

The Court instructed that concealment of true income was an element of the offense. Concealment for other purposes than evading income tax are not punishable under Section 145(b) as a felony, and the instruction as given is highly prejudicial.

The Court instructed that any act, of whatever kind, which tends to evade income tax is enough to make up the crime! Far from it. The decisions are uniform that such is not the law, and there must be an affirmative wilful act done with a positive intent to evade income tax, with knowledge that it is evading the tax, as well as a tax owing

to evade to constitute the crime. This instruction alone is enough to reverse the judgment. The Court goes on to say that filing of a false return is an act that is an evasion and enough to make up the crime. This left the jury to determine if there was any mistake in the return, the defendant should be convicted! This is highly prejudicial error. This left the jury to determine if the return differed from the testimony of the agents as to any matter, it was enough to convict! This is highly prejudicial error.

The Court instructed as to "willful" in the alternative, not in the conjunctive as set forth in the Spies and Murdock cases. The Court instructed that *careless* disregard as to whether one has the right to do the act was of itself "willful" within the statute! *Negligence or carelessness* as to law as to how one shall make an income tax return is not a felony, and Congress never intended it to be. Yet the Court instructed the jury it was and no doubt the jury considered the defendant might have been negligent in seeking to discover the law as to what was or was not taxable or was or was not deductions, and returned their verdict accordingly. This is error of the grossest kind.

The Court instructed the jury that "willfulness" could be infered or presumed, rather than requiring the prosecution to prove by evidence beyond a reasonable doubt and to a moral certainty each element including the essential element of "wilfulness" made the subject of the Spies and Murdock

cases as an essential distinction between the misdemeanor and the felony.

The Court instructed the jury that the prosecution had proved she was the sole proprietor of Kay's Club, she knew the true amounts of her gross income! As if the defense of forgetfulness had no application. As if she were charged criminally with knowledge or acts of her agents, servants, or accountants she did not direct but which took place within the scope of their employment. As if the doctrine of respondeat superior applied to criminal cases! As if a person could actually remember every detailed transaction during an entire year, no matter how inconsequential and no matter by what servant, agent or accountant it was conducted! This instruction alone is per se, error and grounds for reversal.

The Court's instruction on material variance and that the government need only prove a "substantial" amount of tax was highly prejudicial. To some, $10 tax is a substantial sum, to others $172 is a substantial sum to earn in 6 months of business operations, but judged by the amounts charged in the indictment, and the various importance individuals in the jury attach to small sums, and the subjective standards to be attached to the word "substantial amount of tax", this was likely to mislead the jury, and should have contained the elements of material variance known to the law.

The Court instructed the jury that deposits in the bank account of the defendant were potent proof that such deposits were income, totally dis-

regarding the prosecution's testimony by their own agent that some bank deposits were proceeds of loans, and in total disregard of the custom of bars to cash checks, as shown in the evidence some were bad. Certainly, such an instruction in view of the testimony that some were checks cashed and deposited for collection, is error.

The Court instructed the jury that proof of money spent in a certain year was proof of income of the defendant for that year. In view of the proof of the husband's earnings going into the business, she should not be charged with more than her half under the community property law, *after* the marriage and not for the whole year. Money clearly borrowed by government testimony, and spent makes this instruction particularly vicious. Furthermore, the government's own evidence shows that for 1943 and 1944, the business ventures of rental property were a loss. Certainly payment of those losses are improperly instructed by the Court to be income—they are deductions in any theory, yet they were spent. Also money spent, representing liquidated assets by depreciation, is not income under any theory.

The Court instructed the jury that where there are joint returns of husband and wife, and a deficiency is asserted against one of the spouses for additional income, the spouse against whom it is asserted is liable. This is far from the law of the *Cole case,* and the mere assertion of a claim of tax never did incur liability, particularly in a criminal case where it must be proved. No doubt

the jury following this instruction took the bare assertion as raising the liability.

The Court by formula instruction, Transcript 887, instructed the jury that mere willful attempt to evade, was grounds to convict, even without any tax being due; and that the forgiveness feature did not apply where there was no fraud, assuming the defendant guilty of fraud!

A reading of the instructions, assuming that the jury knew no income tax law, nor law applicable to felonious wilful evasion of income tax, would certainly mislead a jury, and leave many issues without instructions. If we assume the jury knew what the ordinary layman knows of tax law, the points uninstructed would leave a kaleidoscope of divergent views, many erroneous, involving many material issues. This is not the essence of a fair trial, for the accused is entitled to be tried upon instructions that fairly state the law involved, upon the issues presented.

CONCLUSIONS

1. The Bill of Particulars was improperly denied, resulting in surprise and injury to the defense.

2. There was no case made against the defendant sufficient to uphold the verdict or judgment.

3. There are numerous errors in the record, that result in prejudice and damage to the defense.

4. The instructions did not properly state the law.

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